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No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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A. This Case Presents The Straightforward Legal Question Whether The *Brooke Group* Test, Rather Than A Subjective "Fairness" Standard, Governs Predatory Buying Claims

Respondent attempts to create confusion about what the court of appeals decided. But there is no doubt about the holding below and the issue presented here: the rule in the Ninth Circuit is that liability may be imposed under Section 2 of the Sherman Act if a jury finds that the defendant purchased more materials "than it needed" *or* paid a higher price for them "than necessary," to prevent competitors from obtaining those materials "at a fair price." Pet. App. 7a n.8. Respondent errs in contending that we have misstated the jury instruction that articulates this standard and was approved by the court of appeals. See Br. in Opp. 11, 21.

Most of the instruction quoted by respondent is immaterial to the issue here. The language identified by the Ninth Circuit as the "relevant jury instruction" (Pet. App. 7a n.8) informed the jury that it could condemn "[a]nti-competitive conduct," and that it "may regard it as an anti-competitive act" if Weyerhaeuser purchased more logs "than it needed" or paid more for those logs "than necessary" to keep the plaintiff from obtaining logs at a "fair" price. *Ibid.*; see *id.* at 14a n.30. Rejecting the *Brooke Group* standard, the court of appeals held that this instruction "provided sufficient guidance regarding how to determine whether conduct was anti-competitive." *Id.* at 14a. Whether that decision was correct is the straightforward question of law presented here.[1]

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[1] Respondent misleads the Court in asserting that "the American Bar Association's Sample Jury Instructions * * * were reflected in the jury instructions in this case on anticompetitive conduct." Br. in Opp. 21. Language similar to part of the ABA instruction was included in the charge, but the ABA model instruction does *not* include anything resembling the "more than needed/higher than necessary/fair price" language that was determinative in this case.

Respondent also attempts to obscure the court of appeals' ruling by reciting at some length the "alleged 15 different specifications of anticompetitive conduct" that it argued below. Br. in Opp. 9-10. See *id.* at 1, 6-9. These allegations are wholly beside the point here. As we noted in the petition (at 4 n.2) – and as respondent does not deny – the Ninth Circuit explicitly rested its decision upholding liability exclusively on the assertions regarding "predatory overbidding." Pet. App. 18a. The court expressly declined to "analyze whether substantial evidence supports the other alleged anticompetitive acts." *Ibid.* Thus, as the case comes to this Court, it turns on whether the Ninth Circuit's subjective "more than needed/higher than necessary/fair price" standard, rather than the rule of *Brooke Group*, governs allegations of predatory buying.[2]

B. Immediate Review Is Warranted

1. We explained in the petition (at 2-3, 26-30) that the significant practical and doctrinal implications of the Ninth Circuit's decision strongly favor a grant of certiorari. Although respondent purports to disagree, the most noteworthy aspect of the brief in opposition is its failure to address *at all* the central problem with the decision below that makes immediate review imperative: businesses cannot know how to comply with the Ninth Circuit's subjective "fairness" standard. Respondent makes no attempt to explain how juries are

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[2] Respondent asserts that elements of our argument are not preserved. Br. in Opp. 19-20. This contention is mystifying. Before the Ninth Circuit, Weyerhaeuser presented as separate issues "[w]hether Weyerhaeuser is entitled to judgment as a matter of law, because Weyerhaeuser's purchasing practices were lawful under *Brooke Group*," and "[w]hether Weyerhaeuser is entitled to a new trial, because the jury instructions misstated the law of predatory purchasing." Appellant Ct. App. Br. at 2-3. It presented extensive argument on these points. *Id.* at 22-32, 41-44. And, of course, the issues were squarely decided by the Ninth Circuit.

to determine what price is "higher than necessary" or "fair." It does not deny that the already substantial risk of jury confusion (and of "false positives") that is inherent in any subjective standard is greatly compounded by the reality that rivals and juries will regard competition from lower-cost, more efficient firms as "unfair" – even though "this conception of fairness is, of course, antithetical to both competition and economic efficiency." 1 P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 111d, at 103 (2d ed. 2002). And respondent does not dispute then-Judge Breyer's demonstration that vague liability standards just like the one articulated here are unmanageable and unadministrable. See Pet. 23-24.

The practical problems that will flow from this "marshmallow" standard are not in the least abstract, speculative, or far-fetched. Consider the circumstances of an executive (or of a lawyer who has read the Ninth Circuit's decision and is asked to advise the executive) in a fiercely competitive industry. The executive must place orders for inputs, an essential component that sometimes is in short supply. May the executive buy more inputs than are needed now, in hopes that an advertising campaign will increase demand for the company's product? May he pay slightly more than the list price so as to cement a favorable relationship with a maker of especially high quality inputs? May she make an especially high bid because she fears that competing product manufacturers are likely to increase their purchases? May he increase his bid to purchase the last of the scarce blue inputs, when doing so will make those components unavailable to a less efficient rival? Questions like these, and innumerable others like them, arise thousands of times in the real world every day. But under the Ninth Circuit's standard, an aggressively competitive answer to any of these questions could make the purchaser liable for trebled antitrust damages.

That is why the petition in this case has attracted an extraordinary range of *amicus* support from a broad cross-section of industry – technology, manufacturing, agriculture,

and consumer products companies – as well as three prominent groups representing the entire business community. Indeed, the timberland owners who sell logs to companies like Weyerhaeuser and respondent, and who ostensibly were to be the ultimate *victims* of Weyerhaeuser's alleged predatory scheme, have filed a brief explaining that in reality it is the Ninth Circuit's decision that will harm them by chilling legitimate competition for their logs, and reducing the prices they are able to obtain. See Campbell Group Am Br. The various *amici* provide concrete examples that illustrate the ways that the ruling below "create[s] widespread uncertainty for significant portions of the American economy" and "casts a shadow over many routine, day-to-day purchasing decisions." American Meat Inst. Am. Br. 3; see *id.* at 2-3; Campbell Am. Br. 18-20; Business Roundtable Am Br. 7.

The inevitable result, as we argued in the petition (at 26-28) and as *amici* emphasize, is that the Ninth Circuit's rule *already* is discouraging competition by any firm that does a national business and therefore is subject to suit in the Ninth Circuit. Every sensible business will pause before engaging in aggressive buy-side competition; in many cases, fear of burdensome litigation and potentially crippling liability will lead buyers to lower their bids and reduce their purchases. That will reward less-efficient competitors, depress prices for suppliers, and discourage the innovation that benefits consumers. The Ninth Circuit's rule thus will "undercut[] the very economic ends [it] seek[s] to preserve." *Barry Wright*, 724 F.2d at 234. Respondent could not – and does not – deny any of this; that in itself makes review appropriate.[3]

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[3] Respondent relies on the Ninth Circuit's statement that increased production and new innovation is less likely in this case because the alder supply is relatively inelastic. Br. in Opp. 25 (citing Pet. App. 11a). But this assertion, which finds no support whatsoever in the record, is both wrong and immaterial. There is no reason to doubt the fundamental economic proposition that increased prices

2. Respondent nevertheless maintains that the Court should deny certiorari because the Ninth Circuit's decision is "idiosyncratic" (Br. in Opp. 1), there is no square conflict in the circuits on the issue presented, and allegations of buy-side predation have not been widely litigated since *Brooke Group*. *Id.* at 14-18. To the extent that is true, we submit, it is because courts and potential litigants understandably assumed that the *Brooke Group Matsushita* standard governed claims of predatory buying; indeed, even before *Brooke Group*, the Fifth Circuit held that predatory buying and selling claims should be governed by the same standard.[4]

But the Ninth Circuit's decision in this case, which has been widely noted and discussed,[5] has fundamentally

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will increase supply over the long run and, as *amici* Campbell Group *et al.* show (at Br. 12-13), will do so even in the short term. In any event, the Ninth Circuit did not purport to state a separate rule regarding the application of *Brooke Group* for elastic and inelastic markets, and the jury was not asked to make a finding on the point. Moreover, any such approach would be completely unworkable. The participation of amici from a wide variety of industries confirms the broad impact of the Ninth Circuit's decision. Respondent also asserts that Weyerhaeuser hoarded or destroyed logs. Br. in Opp. 25-26. But the court of appeals made no reference to, and did not rely upon, evidence of any such practice.

[4] See Pet. 15-16 (discussing *In re Beef Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990)). Respondent is incorrect in attempting to distinguish *In re Beef* on the ground "that the claim [in that case] failed for insufficient evidence of market power." Br. in Opp. 15. The Fifth Circuit rejected *other* claims on that ground; it rejected the predatory buying claim because there was no evidence the defendant paid "a price higher than that which would allow the packer to make a profit." 907 F.2d at 515.

[5] See, *e.g.*, American Bar Association, *Ninth Circuit Holds that Dangerous Probability of Recoupment Not Required in Predatory Overbidding Cases*, Sherman Act Section 2 E-Bulletin (June 6, 2005); *9th Cir. Affirms $78.7 Million Verdict Against Weyer-*

changed the legal landscape. For the reasons set out above, that decision will alter real economic behavior and foment strike suits. The issue here accordingly is ripe for review. Despite respondent's assertion to the contrary, monopsony and buy-side predation have been addressed extensively in the antitrust literature; a sample of this scholarship is cited in the petition (at 29 n.15). The Fifth Circuit has reached the opposite conclusion regarding the issue. And a broader conflict among the circuits is not likely to develop because forum-shopping plaintiffs will take advantage of the Sherman Act's liberal venue rule to file their predatory buying lawsuits in the Ninth Circuit.[6]

Moreover, as we showed in the petition (at 29 & n.14), the Court has reviewed and set aside aberrant antitrust decisions in the absence of numerous conflicting decisions even when the issues involved had implications that were less far-reaching than those of the holding below. And there is no reason for review to wait when a decision that plainly is erroneous – and that will inflict significant injury to the national economy – departs from principles announced by this Court. See Pet. 29-30 & nn 14, 16.[7]

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haeuser, 13 No. 4 Andrews Antitrust Litig. Rptr. 9 (July 19, 2005); N. Stoll & S. Goldfein, *The Ninth Circuit – An Appellate Outlier*, New York Law Journal, June 21, 2005, at 3; NERA Economic Consulting, *Appeals Court Verdict on Weyerhaeuser Upholds Predatory Overbidding Charges*, Global Antitrust Weekly Newsletter, May 28, 2005 - June 3, 2005, at 9.

[6] In addition, much litigation that is initiated will not go to judgment; antitrust lawsuits are notoriously time-consuming, burdensome, and expensive, factors that – along with the fear of trebled damages – often yield extortionate settlements.

[7] Respondent asserts (at 16-17) that the absence of adverse consequences from the Ninth Circuit's decision in *Reid Brothers* somehow undermines our argument about the consequences of the decision below. *Reid Brothers* relied entirely on the Ninth Cir-

3. In arguing to the contrary, respondent calls attention to the brief filed by the United States in No. 02-1865, *3M Co.* v. *LePage's Inc.*, cert. denied, 124 S. Ct. 141 (2004). See Br. in Opp. 18-19. In that case, the Third Circuit declined to apply the *Brooke Group* test to a claim challenging a bundled rebate program. *LePage's Inc.* v. *3M Co.*, 324 F.3d 141 (3d Cir. 2003). The Court invited the Solicitor General to submit the views of the United States on whether certiorari should be granted; the United States recommended against review and the Court followed that recommendation. We fully agree that *LePage's* is instructive here, but respondent draws the wrong conclusions from the United States' brief in that case.

The United States observed that "it would be desirable to provide the business community, consumers, and the lower courts with additional guidance on the application of Section 2 to bundled rebates," but concluded that *LePage's* did "not provide a suitable vehicle for providing such guidance." No. 02-1865, U.S. Br. 8. That was so because "[t]he court of appeals was unclear as to what aspect of bundled rebates constituted exclusionary conduct" (*ibid.*; see *id.* at 16); the Third Circuit did not "definitively resolve[] what legal principles and economic analyses should control" (*id.* at 8; see *id.* at 18); there was "substantial uncertainty in the record below concerning facts that could be significant" (*id.* at 8); and there was no "urgent need justifying this Court's immediate intervention." *Ibid.*; see *id.* at 19.

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cuit's then-applicable predatory *selling* standard, which permitted liability for above-cost pricing. That standard was undercut by this Court's decisions just three years later in *Cargill* and *Matsushita*: "reasoning in both cases suggests that only below-cost prices should suffice" to establish liability, even though both opinions formally reserved the question. *Brooke Group*, 509 U.S. at 223. This Court's decisions thus eliminated the chilling effect that *Reid Brothers* otherwise would have had. The Ninth Circuit's decision in this case to adhere to its prior view despite *Brooke Group* creates a new rule that will disrupt legitimate purchasing behavior.

All of those considerations point in the other direction in this case. There is no lack of clarity in the Ninth Circuit's decision or in its view of the legal and economic principles that apply. There is no uncertainty in the record; it is undisputed that Weyerhaeuser (and its relevant components) made a profit throughout the alleged predation period. And, as we have explained, there *is* an "urgent need" for immediate review in this case. In *LePage's*, the United States was unsure whether the Third Circuit's decision would have a widespread impact because "it is not clear that monopolists commonly bundle rebates for products over which they have monopolies with products over which they do not." No. 02-1865, U.S. Br. 19. Here, in contrast, the challenged practice – aggressive (but still profitable) buying of raw materials and other inputs – is ubiquitous throughout the economy.

On the merits, as well, the United States' filing in *LePage's* suggests agreement with our position here. The United States noted that the bundling of rebates at issue in *LePage's* "is not necessarily procompetitive" because it is possible to imagine circumstances where "a bundled rebate or discount can * * * exclude an equally efficient competitor." No. 02-1865, U.S. Br. 12, 13. In this, the United States contrasted bundled rebates with "a low but above-cost price on a single product" (*id.* at 12-13), explaining that *Brooke Group* "made pricing below the defendant's costs the touchstone" in that context. *Id.* at 11. This case – like *Brooke Group* but unlike *LePage's* – does involve a challenge to above-cost pricing regarding a single product. Respondent therefore can take no solace in *LePage's*. If there is doubt on this score, of course, the Court may invite the government to express its views.

C. The Decision Below Frustrates Antitrust Policies

Finally, respondent's defense of the Ninth Circuit's decision is strikingly anemic. Respondent asserts that evidence of intent to injure competition can take the place of the objec-

tive evidence required by *Brooke Group* (Br. in Opp. 20-21); that allegations of monopoly and monopsony should not receive similar treatment (*id.* at 22-23); and that price cutting for consumers is the only "type of price competition that the antitrust laws are designed to protect." *Id.* at 24. Each of these points is wrong.

First, evidence of intent to damage competitors is of little value in economic analysis – especially when the plaintiff is complaining that it was injured by *hard competition*. After all, "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. * * * [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.). See, *e.g.*, *Morgan* v. *Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989) (proof of predation requires "a separate showing of predatory conduct"); R. Posner, ANTITRUST LAW 214-15 (2d ed. 2001) (statements of "competitive prowess" are "[e]specially misleading" to judges and juries).

Second, respondent simply ignores the pervasive view of courts and antitrust scholars, described in the petition (at 12-13) and by *amici* (see, *e.g.*, Business Roundtable Am. Br. 6-7 n.2), that "assymetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005). Respondent's argument to the contrary is based on a single article, which it cites for the proposition that "monopoly and monopsony are not completely analogous." Br. in Opp. 22 (citing J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 5, 11, 43-44 (1991)). But the view of the authors is that the differences between monopsony and monopoly justify making it *harder* to establish a buy-side than a sell-side claim. Needless to say, that conclusion does not help respondent.

Third, and most fundamentally, respondent disregards the many ways in which buy-side competition unquestionably is beneficial and advances antitrust policies. As we showed in the petition (at 14-16), this Court has held unequivocally that the Sherman Act protects sellers. Even if one focuses solely on consumers,[8] we also showed (at 16-17) that higher prices for suppliers must be presumed to help the ultimate purchaser by encouraging innovation and increased production. *Amici* forcefully confirm that view. See, *e.g.*, Campbell Group Am. Br. 12-13. Respondent does not address any of these points. Because the decision below thus discourages healthy competition, frustrates antitrust policies, and departs from principles announced by this Court, further review is necessary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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[8] Respondent complains that Weyerhaeuser argued below that "there could be no actionable claim unless there was injury to downstream consumers." Br. in Opp. 25 n.10. Weyerhaeuser did advance that position in a footnote in its brief to the Ninth Circuit panel. But the Ninth Circuit made no reference to, and did not rely on, that footnote in reaching its conclusions. Even if that position were accepted, there is no doubt that respondent would *lose* because the jury's verdict establishes that Weyerhaeuser lacked power in the downstream market and that its conduct accordingly caused no harm to the ultimate consumers. See Pet. 4 n.2.